INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Reasons for granting the writ	7
Conclusion	13
Appendix A	15
Appendix B	23
Appendix C	45

CITATIONS

Cases:

Alabama-Tennessee Nat. Gas Co. v. *Lehman-Hoge & Scott*, 122 F. Supp. 314	12
Bankers Title & Abstract Co. v. *Ferber Co.*, 15 N.J. 433, 105 A. 2d 408	8, 12
Claremont Securities Corp. v. *Hamilton*, decided September 30, 1954 (1954 P-H, par. 72,879)	12
Great American Indemnity Co. v. *United States*, 120 F. Supp. 445	12
Phoenix Indemnity Co. v. *Earle*, 218 F. 2d 645	12
Republic Nat. Life Ins. Co. v. *Hedstrom*, 346 Ill. App. 555, 105 N.E. 2d 782	8
Samms v. *Chicago Title & Trust Co.*, 349 Ill. App. 413, 111 N.E. 2d 172	8, 12
United States v. *Acri*, 348 U.S. 211	8, 9, 10
United States v. *Albert Holman Lumber Co.*, 206 F. 2d 685, rehearing denied, 208 F. 2d 113	12
United States v. *Eisinger Mill & Lumber Co.*, 202 Md. 613, 98 A. 2d 81	8, 10, 12
United States v. *Frederick's Brewing Co.*, decided November 8, 1954 (N.D. Ill.; 1954 P-H, par. 72,889), now pending C.A. 7, *sub nom. United States* v. *White Bear Brewing Co.*	12
United States v. *Gilbert Associates*, 345 U.S. 361	12

Cases—Continued

Page

United States v. *Griffin-Moore Lumber Co.*, 62 So. 2d 589 12

United States v. *Kings County Iron Works, Inc.*, decided June 29, 1955 (1955 P-H, Vol. 4, par. 72,815) 8, 10, 11, 12

United States v. *Liverpool & London Ins. Co.*, 348 U.S. 215 .....8, 9, 10

United States v. *New Britain*, 347 U.S. 81..... 7, 10

United States v. *Scovil*, 348 U.S. 218.....8, 9, 10

United States v. *Security Trust Co.*, 340 U.S. 47.. 8, 9

Statutes:

Internal Revenue Code of 1939:

Sec. 3670 ..... 8, 15
3671 ..... 8, 15
3672 15

Internal Revenue Code of 1954:

Sec. 6321 8
6322 8
6323 8

1 Mississippi Code, Annotated (1942 ed.):

Sec. 356 ..... 9, 16
357 17
359 .....7, 9, 18
360 18
361 19
363 ..... 10, 19
365 20
366 20
371 21
372 21
380 .....7, 9, 22

Miscellaneous:

H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A406-A407 8

S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 575-576. 8

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

I. J. COLOTTA, FRANK M. RINEHART, and L. A. CHAMBLESS and F. R. LONG (doing business as partners under the firm name of Long & Chambless Plumbing & Heating Company)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi.

OPINION BELOW

The opinion of the Supreme Court of Mississippi (Appendix B, *infra*, pp. 23-32) is reported at 79 So. 2d 474.

JURISDICTION

The judgment of the Supreme Court of Mississippi (Appendix B, *infra*, p. 32) was entered

April 18, 1955. By order of Mr. Justice Black, dated July 13, 1955 (Appendix B, *infra,* p. 44), the time for filing a petition for a writ of certiorari was extended to and including August 6, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTION PRESENTED

Whether a lien of the United States for unpaid federal taxes, arising under Sections 3670 and 3671 of the Internal Revenue Code of 1939, is superior to a statutory mechanic's lien accorded by state law to contractors, laborers and materialmen, where the contract giving rise to the mechanic's lien had been performed but no steps had been taken to file or enforce such lien before the federal lien arose and was recorded.

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1939 and of the Mississippi Code of 1942 are printed in Appendix A, *infra,* pp. 15-23.

STATEMENT

This action was brought in the Chancery Court of Sunflower County, Mississippi, by Frank M. Rinehart on March 26, 1953, against I. J. Colotta, W. A. Hull and J. A. Hull to recover judgment against Colotta (the taxpayer) in the sum of $4,144.02, with interest, and for special execution to enforce a materialman's lien under Sections 356, *et seq.* of the Mississippi Code of 1942 (Appendix A, *infra,* pp. 16-23) against certain de-

scribed property belonging to the taxpayer (R. 4-11). On April 2, 1953, L. A. Chambless and F. R. Long, doing business under the firm name of Long & Chambless Plumbing & Heating Company, filed a petition for intervention (R. 15-20) [1] praying judgment against Colotta for the sum of $825.-86, with interest, and special execution to enforce a similar materialman's lien asserted against the same property.

On May 1, 1953, Colotta filed his separate answer (R. 25-34), alleging failure of Rinehart to complete his contract in certain particulars, a general demurrer (R. 34-35), and a motion to transfer the cause to the Circuit Court of Sunflower County (R. 37). On May 8, 1953, W. A. Hull and J. A. Hull filed their separate answer (R. 38-42), asserting their rights against the described property as prior mortgagees. [2]

By order of the Chancery Court entered May 30, 1953 (R. 43), the cause was on July 11, 1953, transferred to the Circuit Court of Sunflower County (R. 44, 45), where Rinehart and the Long & Chambless partnership filed separate declarations (R. 46-50, 93-97) asserting the same claims against Colotta and materialmen's liens against the described property of Colotta, the declaration of Rinehart naming the United States as a defendant

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[1] As they were entitled to do under Section 361 of the Mississippi Code of 1942 (Appendix A, *infra*, p. 19).

[2] The rights of W. A. Hull and J. A. Hull as prior mortgagees were not in issue before the Mississippi Supreme Court and are not in issue here.

(R. 49) on account of a federal tax lien asserted against the property of Colotta. Separate answers were filed in the Circuit Court of Sunflower County by W. A. Hull and J. A. Hull (R. 102-106), again asserting their rights as prior mortgagees, by Colotta (R. 107-114), again alleging failure of Rinehart to complete performance of his contract in certain particulars, and by the United States (R. 115-119), affirmatively asserting its claim of priority for its unpaid taxes. Thereafter, by agreement of the parties, except the United States, which made no objection (R. 335), the cause was by order entered September 30, 1953 (R. 122-123), transferred back to the Chancery Court for trial and decision.

After a hearing on the issues raised by the pleadings (R. 124-331), followed by agreement of counsel (R. 332) other than counsel for the United States, the Chancery Court entered a final decree on November 13, 1953 (R. 334-346; Appendix B, *infra*, pp. 33-44), ordering the entry of judgment for Rinehart (upon certain conditions immaterial here) and the Long & Chambless partnership in the amounts claimed. The court determined that (1) as the parties conceded, the mortgage lien of W. A. Hull and J. A. Hull was prior and superior to all other liens asserted against the described property of the taxpayer, (2) the materialmen's liens of Rinehart and the Long & Chambless partnership were equal in rank and entitled to second priority after the mortgage lien of W. A. Hull

and J. A. Hull, and (3) the lien of the United States ranked in priority after the mortgage lien and the materialmen's liens. It ordered that upon the taxpayer's failure to pay the judgments within a specified time, the described property should be sold, subject to the mortgage of W. A. Hull and J. A. Hull, and the proceeds applied first in satisfaction of the judgments entered in favor of the materialmen's lien claimants, with any balance remaining to be paid to the United States on its tax lien.

The United States appealed to the Supreme Court of Mississippi from that part of the Chancery Court's decree which awarded priority to materialmen's liens over the tax lien. (R. 347-350.) The Supreme Court of Mississippi affirmed the decree of the Chancery Court. (Appendix B, *infra*, pp. 23-32.)

The facts material to the issue here involved, as disclosed by the pleadings and the final decree of the Chancery Court, are not in dispute. On or about May 3, 1952, Frank M. Rinehart entered into a contract with the taxpayer for furnishing the labor and materials for the construction of a building on certain described property of the taxpayer situated in the City of Indianola, Sunflower County, Mississippi. The building was completed on or about November 3, 1952 (except for the defects in construction indicated by Colotta's answers (R. 25-33, 107-114) and the final decree of the Chancery Court (R. 334-346)), at which time the total

amount payable to Rinehart under his contract was $32,925.76, of which amount only $28,781.74 had been paid, leaving a balance of $4,144.02.

On June 4, 1952, the partnership composed of respondents L. A. Chambless and F. R. Long contracted with the taxpayer to furnish the labor and material for installing, at a cost of $4,145.88, a heating plant in the building being constructed by Rinehart. This work was completed on or about October 23, 1952, at which time a balance of $825.86 remained unpaid.[3]

In its answer to the declaration filed in the Superior Court of Sunflower County (R. 115-119) the United States asserted a lien for federal taxes assessed against Colotta for the years 1946 to 1949, inclusive, in the amount of $46,729.23 which were included on an assessment list received in the Collector's office on December 5, 1952, and with respect to which a notice of lien was filed in the office of the Chancery Clerk of Sunflower County, Mississippi, on December 8, 1952.[4]

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[3] In order to finance construction of the building the taxpayer borrowed an aggregate of $20,000 from W. A. Hull and J. A. Hull, evidenced by a promissory note for $15,000 dated May 7, 1952 (R. 319), due May 7, 1953, and a demand promissory note for $5,000 dated August 2, 1952 (R. 320-322), no part of which had been paid when this action was brought. As we have indicated (*supra*, p. 3, n. 2), it is undisputed that the mortgage securing these loans (R. 323-331) was superior in right to both the federal tax liens and respondents' materialmen's liens.

[4] The answer of the United States also included a claim for $760.18 assessed against the taxpayer for 1952. Evidence introduced at the trial, however, indicated that the taxes for 1946, 1947, and 1952 had been paid, and the fed-

While the contracts under which respondents' mechanics' liens are asserted were completed before the federal tax liens arose (December 5, 1952) and were recorded (December 8, 1952), respondents had neither recorded their contracts under Section 359 of the Mississippi Code (Appendix A, *infra*, p. 18) nor filed the *lis pendens* notice provided for by Section 380 of that Code (Appendix A. *infra*, pp. 22-23). Respondent Rinehart ultimately filed his contract on December 31, 1952 (R. 90-91, 198); respondents Chambless and Long, so far as the record reveals, never filed theirs. And the record shows no *lis pendens* notice of either contract filed at any time.

On the foregoing facts, the Chancery Court held (R. 334-346) that the materialman's liens were prior and superior to the liens of the United States. The Supreme Court of Mississippi, affirming, found no decision of this Court dispositive of the "exact question" presented (Appendix B, *infra*, p. 29), but concluded that the treatment of municipal tax liens in *United States* v. *New Britain*, 347 U.S. 81, supported its conclusion that the federal liens should be subordinated here. (Appendix B, *infra*, pp. 29-32.)

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Mississippi is contrary to this Court's decisions in

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eral tax lien released to that extent, so that at the time of the trial there was owing to the Government only delinquent taxes and interest for the years 1948 and 1949 in the sum of $33,431.25. (R. 227.)

United States v. *Security Trust Co.*, 340 U.S. 47, *United States* v. *Acri*, 348 U.S. 211, *United States* v. *Liverpool & London Ins. Co.*, 348 U.S. 215, and *United States* v. *Scovil*, 348 U.S. 218. On "the exact question as to the priority between a mechanic's lien such as is here involved and a Federal tax lien" (opinion below, Appendix B, *infra*, p. 29), the decision below conflicts squarely with the decision of the Court of Appeals for the Second Circuit in *United States* v. *Kings County Iron Works, Inc.*, decided June 29, 1955 (1955 P-H, Vol. 4, par. 72,815), reprinted as Appendix C, *infra*, pp. 45-54, and the decision of the Maryland Court of Appeals in *United States* v. *Eisinger Mill & Lumber Co.*, 202 Md. 613, 98 A. 2d 81.[5] Because the controlling decisions of this Court, followed in Maryland and in the Second Circuit, have been misconceived by the Mississippi Supreme Court, and because the relative priorities of mechanics' liens and federal tax liens present a frequently recurring problem, the decision below should be reviewed and reversed by this Court.[6]

1. The decision of this Court in the *Security*

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[5] See also *Republic Nat. Life Ins. Co.* v. *Hedstrom*, 346 Ill. App. 555, 105 N. E. 2d 782; *Samms* v. *Chicago Title & Trust Co.*, 349 Ill. App. 413, 111 N. E. 2d 172; *Bankers Title & Abstract Co.* v. *Ferber Co.*, 15 N. J. 433, 105 A. 2d 408.

[6] While the federal liens here involved arose under Sections 3670 and 3671 of the Internal Revenue Code of 1939, the Internal Revenue Code of 1954 reenacts these provisions without substantive change. See Sections 6321, 6322, and 6323 of the 1954 Code; H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A406-A407; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 575-576.

Trust case—emphatically reaffirmed in the recent *Acri, Liverpool & London Ins. Co.*, and *Scovil* decisions—establishes that the effect of a local statutory lien in relation to the federal tax lien is always a federal question; that a prior inchoate lien under state law cannot take preference over a subsequent lien of the United States for unpaid taxes; and that the local lien remains inchoate, and unperfected in this sense, while it is "contingent upon taking subsequent steps for enforcing it." 340 U.S. at 51. These principles clearly preclude the priority over the federal tax lien accorded to respondents' liens by the decision below. As the undisputed facts show (*supra*, pp. 5-7), respondents had not recorded their contracts, a step for which Mississippi law provides, when the federal lien attached.[7] *Security Trust* demonstrates that a lien is for federal purposes "contingent or inchoate" when it constitutes "merely a *lis pendens* notice that a right to perfect a lien exists." 340 U.S. at 50. Here, respondents' liens had not reached even this insufficient stage of enforcement; it does not appear that they ever filed the *lis pendens* notices for which Section 380 of the Mississippi Code provides (Appendix A, *infra*, pp. 22-23). Moreover, as the course of this litigation makes plain, neither the fact nor the amount of respondents' liens had been finally established un-

[7] Thus, when the federal lien arose, respondents' liens were not even effective under state law against purchasers or encumbrancers without notice. Mississippi Code, Sections 356 and 359 (Appendix A, *infra*, pp. 16-17, 18). Contrast the city liens in *United States* v. *New Britain*, 347 U.S. 81.

der state law when the federal lien attached; in fact, the debtor-taxpayer contested the asserted liability (a contest provided for by Section 363 of the Mississippi Code, Appendix A, *infra,* pp. 19-20) when, after perfection of the federal lien, enforcement of the mechanics' liens was finally undertaken.

It seems clear, therefore, that the court below erred when it found apposite the decision in *United States* v. *New Britain,* 347 U.S. 81. While that decision recognizes that prior state liens may defeat the federal tax lien when they are "perfected in the sense that there is nothing more to be done to have a choate lien" (p. 84), it reaffirms the rule (p. 86), more recently reiterated in the *Acri, Liverpool & London,* and *Scovil* cases, that "inchoate liens" which "may become certain as to amount, identity of the lienor, or the property subject thereto only at some time subsequent to the date the federal liens attach * * * cannot then be permitted to displace such federal liens." And it is this latter rule which applies precisely to the asserted liens which respondents had not filed and had taken no steps to enforce when the federal liens arose.

This is the conclusion of the Second Circuit in *United States* v. *Kings County Iron Works, Inc., supra,* and of the Maryland Court of Appeals in *United States* v. *Eisinger Mill & Lumber Co., supra,* with both of which the decision below conflicts. Like the instant case, both of the former de-

cisions involved mechanics' liens which were based upon contracts performed prior to the attachment of federal tax liens but which were filed after the federal liens arose. In both cases, the private liens were held not to have been perfected and were accordingly subordinated to the federal liens. The Second Circuit concluded that, "at least for purposes of federal taxation [the mechanic's lienor], must be considered essentially like the holder of an attachment or a garnishment lien before it has matured into a judgment."[8] Appendix C, *infra*, p. 50. Similarly, the Maryland Court of Appeals held that "[s]ubsequent steps were necessary to proceed against the property as in *United States* v. *Security Trust*" (202 Md. at 620), and that the mechanic's lien must therefore be subordinated to the federal tax lien.

We think it clear that the Second Circuit and the Maryland Court of Appeals were correct and that the court below has erred. Even more obvious is the fact that a square conflict of decisions is presented. To be sure, the details of local lien law vary from state to state, but there are no differences here which could possibly reconcile the divergent results. And, as the Second Circuit observed in *Kings County Iron Works*, Appendix C, *infra*, p. 48, following a precept long enforced by

[8] Further, the court observed that "until * * * a suit is brought [to enforce the lien], the fact and the amount of the final mechanic's lien remain uncertain. This means that for federal tax purposes the state lien is general and inchoate until such time." Appendix C, *infra*, p. 50.

this Court (see, *e.g.*, *United States* v. *Gilbert Associates*, 345 U.S. 361, 364), "The reason for broad reference to federal principles is the obvious desirability of uniformity in the application of our federal tax laws."

2. The issue involved is of great importance in the administration of the revenue laws. Contests between mechanics' liens and federal tax liens have been a source of considerable litigation in the past and will unquestionably continue to arise in the absence of an authoritative decision by this Court.[9] While the problem is a narrow one which we think is controlled by this Court's decisions defining the status of the federal tax lien, its continuing re-

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[9] An incomplete list of cases involving such contests includes:

1. *Cases where the federal tax lien prevailed: United States* v. *Kings County Iron Works*, decided June 29, 1955 (C.A. 2, 1955 P-H, par. 72,815); *Phoenix Indemnity Co.* v. *Earle*, 218 F. 2d 645 (C.A. 9); *United States* v. *Eisinger Mill & Lumber Co.*, 202 Md. 613, 98 A. 2d 81; *Samms* v. *Chicago Title & Trust Co.*, 349 Ill. App. 413, 111 N.E. 2d 172; *Claremont Securities Corp.* v. *Hamilton*, decided September 30, 1954, by Super. Ct. of San Bernardino County, Calif. (1954 P-H, par. 72,879).

2. *Cases where the mechanic's lien prevailed: United States* v. *Albert Holman Lumber Co.*, 206 F. 2d 685, rehearing denied, 208 F. 2d 113 (C.A. 5); *Alabama-Tennessee Nat. Gas Co.* v. *Lehman-Hoge & Scott*, 122 F. Supp. 314 (N.D. Ala.); *Great American Indemnity Co.* v. *United States*, 120 F. Supp. 445 (W.D. La.); *United States* v. *Frederick's Brewing Co.*, decided November 8, 1954 (N.D. Ill., 1954 P-H, par. 72,889), now pending on appeal to C.A. 7, *sub nom. United States* v. *White Bear Brewing Co.; United States* v. *Griffin-Moore Lumber Co.*, 62 So. 2d 589 (Fla.); *Bankers Title & Abstract Co.* v. *Ferber Co.*, 15 N.J. 433, 105 A. 2d 408.

currence in large numbers of lawsuits renders appropriate and necessary the granting of certiorari to resolve the conflict of decisions which has now arisen.

CONCLUSION

The decision below is manifestly incorrect. It is contrary to recent rulings of this Court and conflicts with decisions of the Second Circuit and of Maryland's highest court. It is respectfully submitted that this petition for a writ of certiorari should be granted.

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JULY 1955.

APPENDIX A

Internal Revenue Code of 1939:

Sec. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., Sec 3670.)

Sec. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Sec. 3671.)

Sec. 3672 [As amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY. AGAINST. MORTGAGEES,. PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) Invalidity of Lien Without Notice.—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment

creditor until notice thereof has been filed by the collector——

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3672.)

1 Mississippi Code, Annotated (1942 ed.):

Sec. 356. *Lien of laborers, materialmen, architects—notice.*—Every house, building or structure of any kind, and any fixed machinery, gearing or other fixture that may or may not be used or connected therewith, railroad em-

bankment erected, constructed, altered, or repaired, shall be liable for the debt contracted and owing, for labor done or materials furnished, or architectural service rendered about the erection, construction, alteration, or repairs thereof; and such debt shall be a lien thereon from the time of making the contract. If such house, building, structure, or fixture be in a city, town or village, the lien shall extend to and cover the entire lot of land on which it stands and the entire curtilage thereto belonging; or, if not in a city, town or village, the lien shall extend to and cover one acre of land on which the same may stand, if there be so much, to be selected by the holder of the lien. If the structure be a railroad or railroad embankment, the lien shall extend to and cover the entire roadbed and right of way, depots and other buildings used or connected therewith. Such lien shall take effect as to purchasers or encumbrances for a valuable consideration without notice thereof, only from the time of commencing suit to enforce the lien, or from the time of filing the contract under which the lien arose, in the office of the clerk of the chancery court; delivery of material to the job is prima facie evidence of its use therein.

Sec. 357. *Lien limited to contractor or employee.*—The lien declared in the foregoing section shall exist only in favor of the person employed, or with whom the contract is made to perform such labor or furnish such materials or render such architectural service, and

his assigns, and when the contract or employment is made by the owner, or by his agent, representative, guardian or tenant authorized, either expressly or impliedly, by the owner.

* * * * *

Sec. 359. *The contract, if in writing, may be recorded.*—When the contract by virtue of which the house, building, structure, fixture, railroad, or railroad embankment may be erected, constructed, altered, or repaired, shall be in writing, it may be acknowledged and recorded as deeds and other instruments. If the contract relate to a house, building, structure, or fixture, it shall be filed for record in the office of the clerk of the chancery court of the county in which the land on which it stands is situated; if the contract relate to a railroad or railroad embankment, it shall be filed for record in the office of the clerk of the chancery court of each county in which the work is to be done; if the contract relate to a boat or water craft, it shall be filed for record in the office of the clerk of the chancery court of the county in which the work is done.

Sec. 360. *Lien—how and when enforced.*—Any person entitled to and desiring to have the benefit of such lien shall commence his suit in the circuit court of the county in which the property or some part thereof is situated, if the principal of his demand exceeds two hundred dollars, within twelve months next after the time when the money due and claimed by the suit became due and payable, and not after; and the suit shall be commenced by petition, describing with reasonable certainty the pro-

perty upon which the lien is averred to exist, and setting out the nature of the contract and indebtedness, and the amount thereof; and the plaintiff shall file therewith in all cases, except where the whole work or materials, or both, were furnished in pursuance of a written contract for an aggregate price, a bill of particulars exhibiting the amount and kind of labor performed, and of materials furnished, and the prices at which and times when the same were performed and furnished; and such suits shall be docketed and conducted as other suits in said court, and may be tried at the first term.

Sec. 361. *Parties to the suit.*— All persons having an interest in the controversy, and all persons claiming liens on the same property, by virtue of this chapter, shall be made parties to the suit; and should any necessary or proper party be omitted, he may be brought in by amendment, on his own application or that of any other party interested; and claims of several parties having liens on the same property may be joined in the same action.

* * * * *

Sec. 363. *Answer to the petition.*—The defendants, or any of them, by answer to the petition, may make any defense they may have against the demand of the plaintiff, and also any counter-claim against him touching the subject-matter of the suit. And should any defendant claim to have a lien upon the same property, for materials furnished or labor done thereon, he may present the same by his answer; and the cause shall be at issue with-

out a replication, and the parties shall be confined at the trial to the cause of action and defense set forth in the pleadings.

* * * * *

Sec. 365. *Judgment.*—In case judgment be given for the plaintiff against the builder, it shall, in case he was actually served with process, be entered against him generally, with costs, as in other cases, and with a special order for the sale of the property upon which the lien exists for the payment thereof, and for an execution, as in other cases, for the residue of what may remain unpaid, after the sale of the property; and if the defendant be brought in by publication only, and have not appeared, the judgment shall be entered specially for the debt and costs, to be made of the property in the petition described; and in case a general judgment be not given against the builder, such proceedings or recovery shall not be a bar to any suit for the debt, except for the part thereof actually made under such recovery.

Sec. 366. *Execution.* When the judgment shall be against the house, building, structure, or fixture and land, or against the same without the land, or against a railroad, or railroad embankment, a special writ of execution shall issue, to make the amount recovered by sale of the property, which shall be described therein; and when both a general and special judgment shall be given, both writs may be issued, either separately or combined in one, or one may be issued after the return

of the other for the whole or the residue, as the case may require.

* * * * *

Sec. 371. *How lien created.*—Unless otherwise expressly provided, the liens created or mentioned in this chapter shall exist by virtue of the relation of the parties, and without any writing, or if in writing, without recording; and the rights and liens conferred may be asserted and enforced by the assigns and personal representatives of the lienor.

Sec. 372. *Subcontractors, laborers, may bind the amount due the contractor by written notice.*—When any contractor or master workman shall not pay any person who may have furnished materials used in the erection, construction, alteration, or repair of any house, building, structure, fixture, boat, water craft, railroad, railroad embankment, the amount due by him to any subcontractor therein, or the wages of any journeyman or laborer employed by him therein, any such person, subcontractor, journeyman or laborer may give notice in writing to the owner thereof of the amount due him and claim the benefit of this section; and, thereupon the amount that may be due upon the date of the service of such notice by such owner to the contractor or master workman, shall be bound in the hands of such owner for the payment in full, or if insufficient then pro rata, of all sums due such person, subcontractor, journeyman or laborer who might lawfully have given notice in writing to the owner hereunder, and if after such

notice, the contractor or master workmen shall bring suit against the owner, the latter may pay into court, the amount due on the contract * * *.

* * * * *

Sec. 380. *Laborers and materialmen may file evidence of claim.*—Any laborer, materialman or architect entitled, or who may become entitled, to a lien under this chapter, or to give hereunder a stop notice to any owner, shall have the right to record his claim in the lis pendens record upon compliance with the following requirements, to wit: (1) he shall (a) reduce his claim therefor to writing and (b) show therein the basis of his claim; (c) all parties thereto or to be affected thereby; (d) a description of the property sought to be bound, and (e) the rights therein claimed, and (f) shall make affidavit to the same. (2) He shall notify the owner in person if a resident of the county, or by registered mail if a nonresident of the county, by giving to the said owner a copy of the notice aforesaid, and he shall attach to the original of the said notice an affidavit that the said notice has been given and the date and manner thereof. Thereupon said notice may be delivered to the clerk of the chancery court, who shall record the claim in the lis pendens record; and if in due form it shall be notice both of the lien and to the owner and all other persons interested, all of whom shall thereupon be bound thereby: Provided, however, that the aggregate amount of all the claims herein provided for shall not be

a lien upon or bind the property for a greater amount that the original contract price or the amount of the owner's liability thereunder at the time the notice is filed, and in event said lien shall exceed the sum of the contract price or the balance due thereunder then they shall be paid pro rata; and, provided, further that no notice hereunder shall operate to extend the time during which the party entitled may bring an action on the claim or to enforce the right with reference to which his claim is filed, and when such rights shall cease, the notice hereunder given shall be without effect.

APPENDIX B

IN THE SUPREME COURT OF MISSISSIPPI

No. 39,593

UNITED STATES OF AMERICA

vs.

I. J. COLOTTA, ET AL.

HOLMES, Justice:

The question presented on this appeal is whether a tax lien of the United States for delinquent income taxes is prior in right to a mechanic's lien asserted under Sections 356, et seq., of the Mississippi Code of 1942, where the Federal tax lien attached subsequent to the effective date of the mechanic's lien.

The action was originally instituted on or about March 26, 1953 by the appellee, Frank M. Rinehart, against I. J. Colotta and others to recover a judgment against Colotta in the sum of $4,144.02, alleged to have been the balance owing on a con-

struction contract, and asserting a lien for labor and materials, commonly called a mechanic's lien, against certain particularly described real property, and wherein the other appellees, L. A. Chambless and F. R. Long, appeared asserting a like lien for $825.86, as the amount due them by contract for the installation of a heating system in connection with the same construction contract.

In May and June, 1952 the appellees entered into written contracts with I. J. Colotta whereby they obligated themselves to furnish all labor and materials for the construction of a building and the installation of a heating system therein on certain particularly described lots owned by the said Colotta in Indianola, Mississippi. The contracts were performed and the work completed on November 3, 1952, at which time there was due and owing to the appellee, Frank M. Rinehart, on his contract a balance of $4,144.02, and due and owing to the appellees, L. A. Chambless and F. R. Long, on their contract the sum of $825.86. On May 7, 1952, Colotta executed a deed of trust covering the property here involved to W. A. Hull and J. A. Hull, securing the sum of $15,000 and advances, all to be used in paying for labor and materials in the construction of the building in question.

On December 5, 1952, an assessment list was received by the Director of Internal Revenue covering Federal income taxes, penalties and interest assessed against the said Colotta and his wife for the years 1946 and 1949, both inclusive, in the amount of $46,729.23. On December 8, 1952, the Director of Internal Revenue filed in the office of the Chancery Clerk of Sunflower County, wherein

was situated the property in question, notice of said claimed Federal tax lien.

Upon a hearing of the cause, the chancellor entered a decree granting priority of payment of the indebtedness secured by the aforesaid deed of trust to W. A. Hull and J. A. Hull, and adjudging the appellees to have priority of payment under their asserted mechanic's liens second to the mortgage lien of the said W. A. Hull and J. A. Hull, but prior and superior to the Federal tax lien of the United States. The priority accorded by the chancellor to the aforesaid deed of trust is not questioned. The United States prosecutes this appeal, contending that the chancellor erred in awarding priority to the mechanic's liens over the Federal tax lien.

The Federal tax lien is asserted under Sections 3670, 3671, and 3672, 26 U.S.C., 1952 ed. The mechanic's liens are asserted under Sections 356, et seq. of the Mississippi Code of 1942. By said section 3670, it is provided that if any person liable to pay any tax neglects or refuses to pay said tax, the amount (including any interest, penalties, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property or rights to property, whether real or personal, belonging to such person.

By said Section 3671, it is provided that unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector.

By said Section 3672, it is provided that the Federal tax lien shall not be valid as against any mort-

gagee, pledgee, purchaser, or judgment creditor unless notice thereof has been filed by the collector (designating the office wherein it may be filed).

Section 356 of the Mississippi Code of 1942 provides that every house, building, structure, etc., erected, altered or repaired shall be liable for the debt contracted and owing, for labor done and materials furnished, and that such debt shall be a lien thereon from the time of making the contract.

Section 360 of the Code of 1942 provides that any person entitled to and desiring the benefit of the lien shall commence his suit in the circuit court within twelve months next after the time when the money became due and payable.

There is no dispute as to the amount for which the mechanic's liens are claimed, or as to the identity of the lienors, or as to the certainty and definiteness of the property on which the mechanic's liens are asserted. The sole question is whether under the facts related the Federal tax lien is to be accorded priority over the mechanic's liens. The appellants assert such priority under the authority of the Supreme Court's decisions in United States v. Security Trust and Savings Bank, 340 U.S. 47; United States v. Gilbert Associates, 345 U.S. 361; United States v. New Britain, 340 [347] U.S. 81; United States v. Acri, decided January 10, 1955 (23 U.S. Law Week 4055); United States v. Liverpool and London and Globe Insurance Co., decided January 10, 1955 (23 U.S. Law Week 4056); and United States v. Scovil, decided January 10, 1955 (23 U.S. Law Week 4050).

The appellant contends that the Federal tax lien is valid as against all other liens with the excep-

tion that it is not valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector in the designated office. It is further the contention of the appellant that under the Mississippi statutes a mechanic's lien is inchoate and imperfect until reduced to a judgment in accordance with the prescribed statutory proceeding for the enforcement of such lien.

The cases relied upon by the appellant are in the main cases involving the question of priority between attachment liens and a Federal tax lien, and cases wherein the insolvency of the debtor was shown, with the exception, however, of the case of United States v. New Britain, supra, which involved a question of priority between the Federal tax lien and a city's specific and perfected statutory lien for real estate taxes and water rents.

The cases relied upon by the appellant and involving the question of priority between attachment liens and a Federal tax lien, and involving debtors shown to be insolvent, are, in our opinion, not applicable to the question presented on this appeal.

The common law rule as to priority is that the first in order of time stands first in order of rank. 33 Am. Jur. 436. In the early cases of Rankin v. Scott (U.S.), 12 Wheat. 177, the Supreme Court of the United States, speaking through Chief Justice Marshall said: "The principle is believed to be universal that a prior lien gives a prior right, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective or be displaced by some act of the party

holding it, which postpone him in a court of law or equity to a subsequent claimant."

It is the contention of the appellant, however, that the mechanic's lien granted by the Mississippi statute, until perfected by judgment, is contingent or inchoate and that it amounts to no more than a lis pendens notice that the right to perfect a lien exists. To this we do not agree. The contention of the appellant is based upon the provision of the statute requiring that any person entitled to and desiring the benefit of the lien shall commence his suit in the circuit court within twelve months next after the time when the money became due and payable. This provision of the State statute merely provides a limitation upon the period within which suit may be begun to enforce the lien. In other words, the statute preserves the lien in effect for a period of twelve months but not longer. The existence of the lien during this twelve months period is not disturbed. At the time of the decision of the case of J. A. Dinkins v. E. J. Bowers, 47 Miss. 219, the State's statute provided a period of limitation of six months instead of twelve months. In the Dinkins case, the Court said: "The statute preserves the lien for six months after the mechanic's debt becomes due and gives that time for suit to enforce it."

Thus the lien is preserved under the statute but a period of limitation is prescribed within which to enforce it. Just as in the case of a valid deed of trust securing a promissory note, a period of limitation is prescribed after the expiration of which no action can be brought to enforce the deed of trust. Nevertheless, the lien of the deed of

trust actually exists during the period of limitation although a proceeding to enforce the same will be barred after the expiration of the prescribed period of six years from the maturity of the debt. We hold, therefore, that the mechanic's lien in question is, under the State statute, not an inchoate lien. It is a definite, fixed lien and in the case before us, the identity of the lienor, the property subject to the lien, and the amount of the lien are established. Hence the case resolves itself into the narrow question whether the Federal tax lien here involved should be given priority over the mechanic's liens here involved. We have concluded that this question must be answered in the negative. There is no showing here of the insolvency of the debtors, and therefore, Section 3466 of the U. S. Revised Statutes giving priority to payment of an indebtedness owing to the United States by an insolvent debtor is not applicable.

We have found no decision of the Supreme Court of the United States, and none have been cited by counsel, involving the exact question as to the priority between a mechanic's lien such as is here involved and a Federal tax lien such as is here involved. However, we are of the opinion that the pronouncements in the case of United States v. New Britain, 347 U. S. 81, 98 L. Ed. 520, support the conclusion which we have reached. In the New Britain case, there was involved the question of priority as between Federal tax liens and a city's specific and perfected statutory liens for real estate taxes and water rents. The liens for real estate taxes arose on various dates in 1947 through 1951. The water rent liens arose upon

failure to pay and they date from December 1, 1947 to June 1, 1951. The Federal tax lien arose at the time the assessment lists were received in the office of the collector of internal revenue on various dates between April 26, 1948 and September 21, 1950. The State Court of Connecticut held that the city's liens were specific and perfected and should take priority over the Federal tax liens. The Supreme Court of the United States held that such characterization of a lien by the State is not of itself conclusive against the Federal Government. However, the Court said that it accepted the holding as the specificity of the city's liens since they attached to specific pieces of real property for the taxes assessed and the water rent due. The Court continued: "The liens may also be perfected in the sense that there is nothing more to be done to have a choate lien, when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." Further, the Court said: "Where the debtor is not insolvent, Congress has failed to expressly provide for Federal priority, with certain exceptions not relevant here, although the United States is free to pursue the whole of the debtor's property wherever situated." Continuing, the Court said: "It does not follow, however, that the city's liens must receive priority as a whole. We believe that priority of these statutory liens is determined by another principle of law, namely, 'the first in time is the first in right' . . . . Thus the priority of each statuory lien contested here must depend on the time it attached to the property in question and became choate."

Accordingly, the Court in the New Britain case concluded as follows: "Under the circumstances, we vacate the judgment of the Supreme Court of Errors of Connecticut and remand the case to that Court to have determined the order of priority of the various liens asserted in accordance with this opinion."

It is to be noted, therefore, that in the New Britain case, the Court was dealing with specific statutory liens established as to the identity of the lienor, the property subject to the lien, and the amount of the lien, and the Court held on the question of priority as between such statutory liens and the Federal tax lien, that priority in time gives priority in right, and accordingly the Court remanded the case for determination by the trial court of the order of priority according to the dates on which the respective liens became effective.

In the case at bar, there is no showing that the debtors were insolvent. The identity of the lienor, the property subject to the lien, and the amount of the lien are established. The mechanic's lien, under the Mississippi statute, was a specific lien which attached to specific property. It was not contingent upon establishment by legal proceedings. It was a choate and perfected lien and was preserved in force for a period of twelve months from the due date of the debt. The proof, without dispute, shows that the mechanic's lien attached prior to the date the Federal tax lien attached. We are, therefore, of the opinion that the trial court was correct in according priority to the mechanic's lien here involved over the Fed-

eral tax lien here involved, and that the decree of the court below should be, and it is, affirmed.

Affirmed.

McGehee, C. J., and Lee, Arrington and Ethridge, J. J., concur.

JUDGMENT

Monday, April 18th, 1955 Court Sitting

39,593

United States of America

vs.

I. J. Colotta

This cause having been submitted at a former day of this term on the record herein from the Chancery Court of Sunflower County and being of the opinion that there is no error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 13th day of November 1953 be and the same is hereby affirmed. It is further ordered that the appellant do have the costs of this appeal to be taxed, etc.

Minute Book "BK" Page 613.

FINAL DECREE

November Term, 1953

November 13, 1953

(Entered in Minute Book No. 30, page 20, of the Minutes of Chancery Court, Sunflower County, Mississippi.)

IN THE CHANCERY COURT OF SUNFLOWER COUNTY, MISSISSIPPI

No. 10,431

FRANK M. RINEHART, COMPLAINANT

v.

I. J. COLOTTA, ET AL, DEFENDANTS

FINAL DECREE

IT APPEARING to the Court that complainant filed herein his original bill of complaint in the Chancery Court of Sunflower County, Mississippi, in this cause, on or about March 26, 1953, and that on or about April 2, 1953, complainant herein amended his said original bill of complaint in the Chancery Court so as to have complainants, L. A. Chambless and F. R. Long, intervene as parties complainant, claiming a lien, as hereinafter set forth, and that proper process was issued for and served on said defendants in this cause in the Chancery Court; and it further appearing to the Court that the defendants, W. A. Hull and J. A. Hull filed their separate answer herein to said bill of complaint and amended bill of complaint, and that the defendant

I. J. Colotta, filed herein in said cause his separate answer to said original bill of complaint and amended bill of complaint, including a motion to transfer the cause to the Circuit Court of Sunflower County, Mississippi;

And it further appearing to the Court that, by decree of the Chancery Court of Sunflower County, Mississippi, dated May 30, 1953, on motion of the defendant, I. J. Colotta, to transfer this cause to the Circuit Court of Sunflower County, Mississippi, and require other parties to be made parties defendant hereto, said cause was transferred to the Circuit Court of Sunflower County, Mississippi, and upon said cause being thus transferred and complainant reforming his pleading, as by law provided it was amended so as to make the United States Government a party defendant hereto;

And It Further Appearing to the Court that, on September 11, 1953, the United States of America filed its separate answer to said cause, in the Circuit Court of Sunflower County, Mississippi, and that, by order of the Circuit Court of Sunflower County, Mississippi, dated September 30, 1953, during the regular September, 1953, term of said Court, and the consent and agreement of all parties complainants and defendants hereto save and except the defendant, United States of America, who made no objection, this cause was transferred to the Chancery Court of Sunflower County, Mississippi, for trial;

And This Cause on this date having come on for hearing, on the pleading, answers and separate answers of all defendants, as aforesaid, and on oral and documentary proof and evidence had and taken

n open Court, and all parties complainant and de-
endants consenting, agreeing to, petitioning and
equesting this Court to hear and determine this
ause, on its merits, and adjudicate the rights of all
arties hereto, and specifically determine the pri-
rity of any and all lienholders, if any, in event any
ecree is awarded complainant against the defend-
nt, I. J. Colotta, and a lien fixed on any of his prop-
rty in the nature of a lien for labor and materials
urnished in the construction of a building thereon
y complainant, Frank M. Rinehart;

And it further appearing to the Court that all
arties complainant and defendants hereto have
onsented and agreed that any issues raised in the
leading by the defendant, United States of Amer-
ca, are considered as joined, in short, by all other
arties hereto, and that none of the parties com-
lainant and defendants hereto are required to re-
orm their pleading in any manner which might
therwise be required by law; and all parties com-
lainant and defendants appearing in open Court,
nd being represented by counsel, and announcing
eady for trial, and the Court having heard the tes-
imony and the argument of counsel, and being duly
nd fully advised in the premises:

It is, Therefore, considered by the Court and
o Ordered, Adjudged and Decreed, as follows, to-
it:

a. This suit arises out of a contract between com-
lainant, Frank M. Rinehart, and defendant,
. J. Colotta, dated on or about May 3, 1952, for the
onstruction of a building on the premises herein-
fter mentioned and described, and in this suit said

complainant claims a lien on said building to enforce payment of the balance due on labor and materials furnished in the construction of said building. All parties hereto consenting and agreeing, it is ordered that complainant, Frank M. Rinehart, do have of and recover from the defendant, I. J. Colotta, the sum of $4,144.02, with legal interest thereon at the rate of 6% from and after November 13, 1953, together with all costs of Court in this cause, for which execution and special execution will issue in manner and form hereinafter set forth; however, the defendant, I. J. Colotta, is given until ten days after final adjournment of this November 1953 term of Court within which to pay said sums, after which date execution and special execution will issue in manner and form as hereinafter set forth;

b. All parties hereto consenting and agreeing, it is ordered that complainant, Frank M. Rinehart, proceed forthwith to complete and make additional repairs and alterations to said building, to-wit:

(1) Alter the roof, where necessary, by using the materials, good workmanship, and the method and manner as described by the witnesses testifying herein, as shall be necessary and sufficient to provide full and complete drainage of water therefrom;

(2) Alter and repair the Canopy, in good workmanship manner, without injury to the existing structure, in the method and manner described by the witnesses testifying herein, as necessary to place same in good condition, and which alteration shall provide adequate drip on stainless steel facing, in place, to prevent water from coming in contact with

plaster on the bottom, and by further painting with sufficient number of coats of stucco paint, all the plaster on the bottom;

(3) Alter and repair Miami Windows on the east side of the building to the extent that they shall operate in the good method and manner for which they are designed and manufactured;

Use of materials, by grades and brand, together with all workmanship, shall be to the complete satisfaction and judgment of N. T. Baggett.

c. That complainants, L. A. Chambless and F. R. Long (doing business as partners under the trade and firm name of Long & Chambless Plumbing & Heating Company) do have of and recover from the defendant, I. J. Colotta, the sum of $825.86, with legal interest thereon at the rate of 6% from and after October 23, 1952, for which execution and special execution will issue in manner and form as hereinafter set forth; however, the defendant, I. J. Colotta, is given until ten days after final adjournment of this November 1953 term of Court within which to pay said sum, after which date execution and special execution will issue in manner and form as hereinafter set forth, which amount the Court finds to be owing said complainants by the defendant, I. J. Colotta, arising out of a written contract dated on or about June 4, 1952, to furnish certain labor and materials for the construction of the building hereinafter mentioned and more particularly set forth;

d. Upon the Court being required to determine what liens, if any, exist, and their priorities, such liens are found to exist, and their priorities are determined in manner thus:

1. On May 7, 1952, the defendant, I. J. Colotta, executed his promissory note to W. A. Hull and J. A. Hull in the amount of $15,000.00, due May 7, 1953, and bearing 6% interest from maturity and stipulating for the payment of 10% attorneys' fees if placed in the hands of an attorney for collection; and on August 2, 1952, the defendant, I. J. Colotta, executed his promissory note to W. A. Hull and J. A. Hull in the amount of $5,000.00, which note bears interest at the rate of 6% per annum from date and stipulates for the payment of 10% attorneys' fees if placed in the hands of an attorney for collection; and on May 7, 1952, the defendant, I. J. Colotta, executed his certain deed of trust to Oscar B. Townsend, Trustee for the use and benefit of W. A. Hull and J. A. Hull, to secure both of said notes and other advances, and which deed of trust specifically provided that the funds being advanced and evidenced by the aforesaid $5,000.00 note were to be used in payment for the construction of a building on the lot hereinafter mentioned, and which deed of trust also provided that the maker of said notes is liable for an additional sum in the amount of 10% of the amount due in event of any suit to protect such security, and the Court finds that the said W. A. Hull and J. A. Hull are the owners and holders of said indebtedness, so secured, and which indebtedness and, in addition, interest, attorneys' fees, damages and suit money are now past due and said notes have been placed in the hands of an attorney for collection; and the Court finds that the principal sum of $20,000.00, so advanced by the said W. A. Hull and J. A. Hull, on or prior to August 2, 1952, thus secured, was

expended by the defendant, I. J. Colotta, in the payment of labor and materials used in the construction of the building herein referred to; the aforesaid deed of trust securing such indebtedness having been filed for record on May 15, 1952, in the office of the Chancery Clerk of Sunflower County, Mississippi, and being of record in Book Q-12, at page 473 thereof;

2. That subsequent to the execution and recordation of the aforesaid deed of trust for the benefit of W. A. Hull and J. A. Hull, and subsequent to the completion of the building herein involved, and after the liens asserted by Frank M. Rinehart and L. A. Chambless and F. R. Long (doing business as partners under the trade and firm name of Long & Chambless Plumbing & Heating Company) became existent and effective, notices of certain income tax liens for the years 1946, 1949, inclusive, against the defendant, I. J. Colotta, were filed in the office of John W. Johnson, Chancery Court Clerk of Sunflower County, Mississippi, in the amount of $55,647.00; and thereafter other notices of income tax liens for the year 1952, against the defendant, I. J. Colotta, and his wife, Mildred B. Colotta, were filed and enrolled in the office of John W. Johnson, Chancery Court Clerk of Sunflower County, Mississippi. Certain payments have been made by the said I. J. Colotta on the lien first above mentioned, due the United States of America, upon certain property of said defendant being released from the lien, but leaving certain sums of money due and owing the United States of America by the said I. J. Colotta under such notices;

3. The Court finds that the amount owing by the

defendant, I. J. Colotta, to W. A. Hull and J. A. Hull, secured by the aforesaid deed of trust, is a first and paramount lien on the real property embraced and conveyed in said deed of trust, and hereinafter described, including the building thereon constructed by the complainant, Frank M. Rinehart, which lien is senior to the lien hereinafter given the complainants, Frank M. Rinehart and L. A. Chambless and F. R. Long (doing business as partners under the trade and firm name of Long & Chambless Plumbing & Heating Company) and the aforesaid lien in favor of the defendant, United States of America.

The judgments hereby awarded complainants, Frank M. Rinehart, and L. A. Chambless and F. R. Long (doing business as partners under the trade and firm name of Long & Chambless Plumbing & Heating Company), in sub-paragraphs "a" and "c" hereof, for which said complainants are hereinafter given a lien on certain lots and a building thereon constructed by said complainant, are superior and paramount to the aforesaid income tax liens or notices of liens in favor of the defendant, United States of America; that is, the aforesaid lien of the defendants, W. A. Hull and J. A. Hull, is first; said lien of complainants, Frank M. Rinehart and L. A. Chambless and F. R. Long, (doing business as partners under the trade and firm name of Long & Chambless Plumbing & Heating Company) are equal and second; and the said liens in favor of the United States of America are third;

e. Complainants, Frank M. Rinehart, and L. A. Chambless and F. R. Long (doing business as partners under the trade and firm name of Long &

Chambless Plumbing & Heating Company) have filed their complaints herein, describing with reasonable certainty the property upon which they claim a lien to exist, and have set out the nature of their contracts and indebtedness claimed, and the amounts thereof, and they are given a lien, subject to the exceptions and reservations hereinabove set forth, against those certain lots or parcels of land of defendant, I. J. Colotta, located, lying and being situate in the City of Indianola, County of Sunflower, State of Mississippi, and more particularly described as follows, to-wit:

> Lots 20, 21, and 22 of Wayne Cox Subdivision to the City of Indianola, Mississippi, according to a map of said subdivision as surveyed and platted by W. M. Thomas, Registered Engineer, of record in Book "3", page 27, of Record of Town Additions on file in the office of the Chancery Clerk of Sunflower County, Mississippi, and said lots being in the NE¼ of the NW¼ of Section 31, Township 19 North, Range 4 West;
>
> together with all and singular, with all improvements thereupon situate, hereditaments and appurtenances thereunto belonging, or otherwise appertaining.

Upon the defendant, I. J. Colotta, failing to pay the aforesaid judgments in favor of complainants, Frank M. Rinehart and L. A. Chambless and F. R. Long, (doing business as partners under the trade and firm name of Long & Chambless Plumbing & Heating Company), including said interest thereon and all costs, upon expiration of ten days after ad-

journment of this term of Court, special execution is hereby provided and will issue, in manner and form as provided by Section 366, Mississippi Code 1942. Such special executions shall issue to the Sheriff of Sunflower County, Mississippi, and he will advertise, sell and convey the above described premises to enforce payment of said judgments for said debts, all in the manner and form as provided by Section 367, Mississippi Code of 1942, and upon such sale of said premises being made, the purchaser shall acquire such estate of the defendant, I. J. Colotta, therein as the said I. J. Colotta had at the time the lien of said complainants attached thereon, as aforesaid, that is, on May 3, 1952, and June 4, 1952, respectively, and the officer making the levy will put the purchaser in possession of said premises, subject to the aforesaid lien of defendants, W. A. Hull and J. A. Hull, but free of any and all other liens on said property and herein involved.

Upon the officer making such sale, he will pay the court costs in this behalf, the costs of the sale, and then pay the proceeds of the sale to said complainants, Frank M. Rinehart, and L. A. Chambless and F. R. Long (doing business as partners under the trade and firm name of Long & Chambless Plumbing & Heating Company) respectively, in payment of their said judgments, notwithstanding the aforesaid lien of the defendant, United States of America, and regardless of whether same may be enrolled in the office of the Chancery Clerk or Circuit Clerk in Sunflower County, Mississippi, and upon such property being sold pursuant to such special execution, if there is any balance remaining unpaid

on said judgments in favor of Frank M. Rinehart and L. A. Chambless and F. R. Long (doing business as partners under the trade and firm name of Long & Chambless Plumbing & Heating Company) or either of them, execution will issue as in other cases against I. J. Colotta for the payment thereof. If there is any balance remaining in the hands of such officer after paying to Frank M. Rinehart and L. A. Chambless and F. R. Long (doing business as partners under the trade and firm name of Long & Chambless Plumbing & Heating Company) under this decree, said officer will pay said amount to the United States of America, as a payment on its aforesaid lien.

f. The Court finds that complainant, Frank M. Rinehart, after having first complied with the requirements of the statutes in such cases made and provided, filed and recorded in the office of the Chancery Clerk at Indianola, Sunflower County, Mississippi, proper notice of his demand and claim to a lien on the aforesaid lots and the building which he constructed thereon, to enforce payment of bills for labor and materials used in the construction thereof, all in manner and form as by law provided:

It is the purpose and intent of the Court that the aforesaid liens hereby given complainants, Frank M. Rinehart, and L. A. Chambless and F. R. Long (doing business as partners under the trade and firm name of Long & Chambless Plumbing & Heating Company), is the lien authorized under applicable statutes in such cases made and provided, and particularly Sections 356, et seq., Mississippi Code of 1942, as same may be amended, including the provision for the judgment and sale of said

premises, and it is the purpose and intent of the Court hereinabove to provide for a special order for the sale of said property upon which the lien exists for the payment of such judgments, and for an execution to issue, as in other cases, for the residue of what may remain unpaid after the sale of the property, and that upon such sale being made the purchaser will be given possession of said premises and shall acquire such estate therein as the defendant, I. J. Colotta, had at the time the aforesaid lien to enforce the sale authorized attached thereon, all in manner and form as such is provided and authorized in applicable statutes in such cases made and provided, but it is understood that such sale will be made subject to the aforesaid lien of W. A. Hull and J. A. Hull, upon said premises, secured by their deed of trust hereinabove set forth.

Ordered, Adjudged, and Finally Decreed, in open Court, on this, the 13 day of November, A.D. 1953.

S. B. THOMAS,
Chancellor

Filed 11/24/1953.

JOHN W. JOHNSON, *Chancery Clerk.*

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1955

UNITED STATES OF AMERICA, PETITIONER

vs.

I. J. COLOTTA, FRANK M. RINEHART, AND L. A. CHAMBLESS AND F. R. LONG (DOING BUSINESS AS PARTNERS UNDER THE FIRM NAME OF LONG & CHAMBLESS PLUMBING & HEATING COMPANY)

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 6, 1955.

(S.) HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 13th day of July, 1955.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 268. October Term, 1954

Argued April 12, 1955 Decided June 29, 1955

Docket No. 23310

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KINGS COUNTY IRON WORKS, INC.,
DEFENDANT-APPELLEE

Before CLARK, Chief Judge, and FRANK and HASTIE, Circuit Judges

Appeal from the United States District Court for the Eastern District of New York, Matthew T. Abruzzo, Judge.

Plaintiff, the United States of America, appeals from a decision, D.C.E.D.N.Y., 122 F. Supp. 219, and judgment subordinating its tax lien under I.R.C. §§ 3670-3672 to a mechanic's lien under state law in favor of the defendant, Kings County Iron Works, Inc. Reversed and remanded.

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CLARK, Chief Judge.

This appeal by the United States involves the relative priority of a federal tax lien and a mechanic's lien under state law. The defaulting taxpayer, Preferred Contractors, Inc., had per-

formed contracting services on premises in New York City for Standard Tinsmith & Roofer Supply Corporation for which it had not been fully paid. When the United States sought to assert its statutory lien under I.R.C. § 3670 on this debt, it was informed that Standard was holding the sum in trust for Kings County Iron Works, Inc., a subcontractor of Preferred, which claimed a mechanic's lien. Ultimately Standard paid the amount in question into court for judicial determination of priority between the United States and Kings. The facts of indebtedness of Preferred to the United States, of Preferred to Kings, and of Standard to Preferred have not been contested by any of the parties concerned. The district court awarded priority to Kings as a "purchaser" protected from unfiled federal liens pursuant to IR.C. § 3672, and as a prior lienor by virtue of its filing of its mechanic's lien in New York County on August 27, 1947. Judge Abruzzo concluded that the government's prior filing on August 21 in Kings County, where Preferred resided, was defective in that under N. Y. Lien Law § 240 the government should also have filed in New York County, where the funds and premises in question were located. D.C.E.D.N.Y., 122 F. Supp. 219. The government's appeal challenges Judge Abruzzo's final conclusion, as well as his subordinate findings concerning the character of the mechanic's lien and the sufficiency of the government's filing.

The Internal Revenue Code gives the government a broad lien for tax collection purposes. I.R.C. §§ 3670-3672. This lien attaches to property

of the taxpayer at the time that the local collector receives the appropriate assessment lists. From then on, the lien is fully perfected against all subsequent liens and interests except that of a mortgagee, pledgee, purchaser or judgment creditor of the taxpayer. For full protection, even against these special classes, notice of the tax lien must be filed in the places designated by state law, or in the appropriate district court if the state has failed so to designate. Here the assessment lists were all received prior to August 21, 1947, when notices of the liens were filed. Apart from the appropriateness of this filing under N. Y. Lien Law §240, the government argues that no perfected prior interests existed as of this date and that filing is not required for perfection of its lien against Kings.

New York law provides Kings as a mechanic's lienor with two separate and distinct forms of protection for its claim. One of these is the ordinary lien on the real estate improved by Kings' services, which lien Kings perfected by filing on August 27, 1947. N.Y. Lien Law § 5. The other, on which Kings mainly relies here, is an interest in the funds which the owner of the improved real estate owes the prime contractor. These funds are deemed a trust fund for the payment of subcontractors, N.Y. Lien Law §§ 13(7), 36-a. and the trust fund arises when the subcontractor performs his services. Thus the main question before us is the relative priority of the federal tax lien and the antedating interest which Kings has in this state-created trust fund.

Generally speaking, the federal tax lien can be

defeated only in one of three ways. Competing lienors may establish that the property on which the government seeks to levy is not the property of the taxpayer at all. They may claim a prior specific and perfected lien entitled to precedence under the rule that "first in time is first in right." *United States* v. *City of New Britain,* 347 U.S. 81. Or, as long as the federal lien is unfiled, they may seek to bring themselves within the classes of creditors discussed above, which are specifically protected by I.R.C. § 3672.[1] All these questions —whether the property is that of the taxpayer, whether a prior lien is sufficiently perfected, whether a creditor can qualify as "mortgagee, pledgee, purchaser, or judgment creditor"—are, in the final analysis, matters of federal law, although state law will be considered where relevant. *United States* v. *Security Trust & Sav. Bank of San Diego,* 340 U.S. 47; *United States* v. *Gilbert Associates,* 345 U.S. 361; *United States* v. *Acri,* 348 U.S. 211; *United States* v. *Liverpool & London & Globe Ins. Co.,* 348 U.S. 215; *United States* v. *Scovil,* 348 U.S. 218; *Rowen* v. *C.I.R.,* 2 Cir., 215 F. 2d 641. The reason for broad reference to federal principles is the obvious desirability of uniformity in the application of our federal tax laws.

Kings here argues that on all three rationales it is entitled to priority over the federal tax lien, as Judge Abruzzo held. Its main argument for precedence is based on the trust fund created by New

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[1] In the special case of securities, I.R.C. § 3672(b) protects what may broadly be considered as bona fide purchasers, even if the government has filed notice of its lien. We are not concerned with that special case here.

York law for the benefit of subcontractors out of funds owing from the owner of the improved property to the contractor. N.Y. Lien Law §§ 13 (7), 36-a. This trust fund is available to the mechanic's lienor without filing, *Wade* v. *Nassau Suffolk Lumber & Supply Corp.,* 275 App. Div. 864, 89 N.Y.S. 2d 294, and has been said to make him a statutory assignee of the fund. *Cranford Co.* v. *L. Leopold & Co.,* 189 Misc. 388, 70 N.Y.S. 2d 183, affirmed 273 App. Div. 754, 75 N.Y.S. 2d, 512, affirmed 298 N.Y. 676, 82 N.E. 2d 580, followed in *Bain* v. *Caruso-Sturcey Corp,* S. Ct., 134 N.Y.S. 2d 246, and *Aquilino* v. *United States,* 133 N.Y. L.J. 13, col. 3 (S. Ct. Mar. 18, 1955).

We cannot see, however, that the trust fund given by these statutory provisions either divests the contractor of his property interest in his chose in action against the property owner or gives the mechanic's lienor a specific and perfected lien, for federal tax purposes. Even if we were to follow the New York cases, they would not take us this far. In *Cranford Co.* v. *L. Leopold & Co., supra,* the lienor was held entitled to priority by analogy to a purchaser, under I.R.C. § 3672—a contention with which we shall deal later. The case does not purport to give the lienor any specific property right beyond the status of a "statutory assignee." The other case on which appellee relies, *United States Fidelity & Guaranty Co.* v. *Triborough Bridge Authority,* 297 N.Y. 31, 74 N.E. 2d 226, is even more remote to the issues now under discussion, for it deals with the rights of a surety who has paid the subcontractor's claim. The surety was held to have perfected his claim to the trust fund

as of the date when he first gave the required bond. This allowed the surety an earlier date of perfecting than even the subcontractor would have had, and antedated also the government's receipt of assessment lists. Whether or not such a predating of the surety's rights would be upheld as against perfected federal tax liens under the more recent decisions of the Supreme Court, we need not now decide. The case as it stands adds nothing to our knowledge of New York's appraisal of the status of the mechanic's lienor as such.

Our reading of the statutes and the cases leads us to conclude that, at least for purposes of federal taxation, Kings must be considered essentially like the holder of an attachment or a garnishment lien before it has matured into a judgment. The use of a trust fund rationale by New York in order to give the mechanic's lienor this kind of lien may be the result of the severe restrictions ordinarily imposed by that law on the attachment of debts. See N. Y. C. P. A. § 916. Until and unless the mechanic's lienor perfects his rights to the trust fund by filing a timely civil action in accordance with § 75 of N. Y. Lien Law, the contractor retains a paramount interest in the property in question, so that the debt belongs to him and is subject to federal levy as such. Furthermore, until such a suit is brought, the fact and the amount of the final mechanic's lien remain uncertain. This means that for federal tax purposes the state lien is general and inchoate until such time. *Illinois ex rel. Gordon* v. *Campbell,* 329 U. S. 362; *United States* v. *Security Trust & Sav. Bank of San Diego, supra,* 340 U. S. 47; *United States* v. *Acri,*

supra, 348 U. S. 211; *United States* v. *Liverpool & London & Globe Ins. Co., supra*, 348 U. S. 215; *United States* v. *Scovil, supra*, 348 U. S. 218. And see Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 Yale L. J. 905 (1954).

Kings never sued to enforce its trust, and Standard's action in refusing to surrender the moneys it held to the tax collector cannot be taken as a legal substitute for such action. The mere fact that in this case Preferred did not contest the validity of Kings' claim does not serve to perfect it as a matter of law before suit or payment. Standard, or any other similarly situated property owner, is not in a position to have either the knowledge or the legal status to assert possible defenses to the claims of the mechanic's lienor; thus it should not be allowed to compromise finally either Preferred's or Kings' rights to the trust fund. Nor can Standard's refusal to surrender these moneys be justified by reference to provisions in its contract with Preferred concerning payment of subcontractors. Such private contractual arrangements are clearly subordinate to the paramount rights of the Government to levy on the property of its taxpayers. *United States* v. *Manufacturers Trust Co.*, 2 Cir., 198 F. 2d 366. At the most, Standard's action can be argued to have perfected King's lien when it was taken. But this in itself postdated the attachment of the government's lien, for Standard's letter was a response to the notice of lien sent it by the tax collector.

Our analogy to the principles of attachment and

garnishment liens is supported here by the clear indicia that New York contemplates some kind of perfecting by the mechanic's lienor of his interest in the trust fund. But it seems extremely doubtful to us that any trust fund device could ever supersede federal tax liens, even if the state purported to omit all perfecting requirements. To be fully choate a lien must attach to specified property, and the amount of the lien must be precisely established. Whether any general trust fund, coming into existence when the mechanic's lienor completes his services, can ever be sufficiently specific to meet these criteria is thus questionable. *Illinois ex rel. Gordon* v. *Campbell, supra,* 329 U. S. 362. Moreover, such a "lien" would not be accompanied by a change in title or possession, which was found in *United States* v. *Gilbert Associates, Inc., supra,* 345 U. S. 361, to be a prerequisite to the perfecting of liens.

Thus as of the crucial date of attachment of the government's lien the trust fund gave Kings no more than an inchoate and general lien. And the mechanic's lien on the improved real estate was then in no better state. In one sense this second lien is of course irrelevant, for it attached to different property, i. e., Standard's real estate, than did the government's lien, which was concerned only with the debt owed to Preferred. But, more significantly, this lien was not perfected until after the government's lien attached, and the New York law is clear that such lien is a complete nullity until notice thereof has been filed. *Riverside Contracting Co.* v. *New York,* S. Ct., 148 N. Y. S. 281, affirmed 165 App. Div. 972, 150 N. Y. S. 1109, af-

firmed 218 N. Y. 596, 113 N. E. 564, Ann. Cas. 1918C 1075. As of August 21, 1947, the latest date of attachment of the government's lien, Kings had as yet acquired no lien on the real property at all.

The mere attachment of the government's lien gives it a fully perfected claim superior to all except mortgagees, pledgees, purchasers, or judgment creditors of the taxpayer. I. R. C. § 3672. In this case the government sought the fullest measure of protection by filing notices of its lien by August 21, 1947, in Kings County, where the taxpayer Preferred resided. Judge Abruzzo found this filing fatally defective, presumably under the last sentence of N. Y. Lien Law § 240(2), enacted pursuant to I. R. C. § 3672(a)(1). The New York law provides: "If the property is in the city of New York at the time the lien arises, the notice or certificate shall be filed in the county within the city of New York or in the town or city where the owner, or each of several owners who are residents of the state, resides at the time the lien arises, and also in the county where the property is situated." While we are disposed to disagree with the conclusion below that a debt should be considered to have a situs apart from that of its owner, the creditor, see *Investment & Securities Co.* v. *United States,* 9 Cir., 140 F. 2d 894, we need not finally decide that issue here, since we are convinced that Kings does not fall within any of the special classes against whom filing is required.

The only claim made by Kings to come within the protection of I. R. C. § 3672 is that it should be considered as akin to a purchaser. This was in effect the holding of *Cranford Co.* v. *L. Leopold &*

Co., supra. Since then, the Supreme Court has had occasion to discuss the definition of "purchaser" in this context, in a case dealing with a landlord's distress lien. *United States* v. *Scovil, supra,* 348 U. S. 218, 221. In refusing to consider the landlord a purchaser, the court said: "A purchaser within the meaning of § 3672 usually means one who acquires title for a valuable consideration in the manner of vendor or vendee." It is obvious without further discussion that Kings, even as statutory assignee of a trust fund, is not a purchaser for federal tax purposes.

The judgment of the district court is therefore reversed and the action is remanded for the entry of a judgment awarding priority to the government's lien over the claim of Kings.

Reversed and remanded.

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